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14 **IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON**

15 HARD 2 FIND ACCESSORIES, 16 INC.	17 Plaintiff, 18 v.	19 NO. 20 COMPLAINT 21 JURY DEMAND
22 Defendants.		

23 **I. PARTIES AND JURISDICTION**

24
25 COMPLAINT AND DEMAND FOR JURY
TRIAL- 1

1 1. Defendant, AMAZON, CORP ("Amazon") is a Delaware Corporation
2 that is licensed to conduct business in the State of Washington. Amazon.com, Inc.
3 maintains a place of business at 410 Terry Avenue, North, Seattle, Washington
4 98109. Washington State Secretary of State records reflect that Amazon's
5 President, Secretary, Treasurer, Vice Presidents, and Directors are located at that
6 address.

8 2. Defendant APPLE, INC., has its principal place of business in
9 Cupertino, California, conducts business in the State of Washington, and is
10 licensed to conduct business in the State of Washington.

12 3. Plaintiff, HARD 2 FIND ACCESSORIES, INC. ("H2F") is a
13 corporation headquartered in the State of New York, licensed to conduct business
14 in New York, and transacted business in the State of Washington during the time
15 frame relevant to this case.

17 4. The acts complained of occurred within the Western District of
18 Washington.

20 5. The Federal Court for the Western District of Washington has
21 personal jurisdiction over the parties and diversity jurisdiction for the claims in
22 this complaint pursuant to 28 U.S.C. § 1332 and subject matter jurisdiction over
23 the claims pursuant to 28 U.S.C. § 1331. This court has supplemental jurisdiction
24 of plaintiff's state law claims under 28 U.S.C. § 1337.

COMPLAINT AND DEMAND FOR JURY
TRIAL- 2

1 6. Venue is proper in the Western District of Washington under 28
2 U.S.C. § 1331(b) because the acts and omissions complained herein occurred in
3 the District and defendants conduct business there.

4

5 **II. INTRADISTRICT ASSIGNMENT**

6

7 7. This action arose in King County, Washington; therefore, pursuant to
8 local rules it should be assigned to the Seattle Division of the Western District of
9 Washington.

10

11 **III. FACTS**

12

13 8. Plaintiff re-alleges paragraphs 1 through 7.

14 9. Amazon "seek[s] to be Earth's most customer-centric company for
15 four primary customer sets: consumers, sellers, enterprises, and content creators."¹

16 10. As to Amazon's "seller" customer set, the company "offer[s]
17 programs that enable sellers to sell their products on [Amazon's] websites and [the
18 customer's] own branded websites and to fulfill orders through [Amazon].
19 [Amazon is] not the seller of record in these transactions, but instead earn fixed
20 fees, revenue share fees, per-unit activity fees, or some combination thereof."²

21 11. Hard 2 Find Accessories, Inc. is one of the "sellers" with whom
22 Amazon conducted business.

23

24 ¹See Amazon.com, Inc.'s SEC Form 10-K, at 2 (December 31, 2012) *available at*
25 <http://pdf.secdatabase.com/1562/0001193125-13-028520.pdf> (last visited January 27, 2014).

²*Id.*

1 12. In the January 2012 timeframe H2F and Amazon entered into an
2 "Amazon Services Business Solutions Agreement" (the "Agreement"). At that
3 time, the Agreement, to H2F's knowledge, contained no arbitration clause.

4 13. At all relevant times hereto H2F actively monitored the Amazon.com
5 website in order to keep apprised of any changes to the Agreement.

7 14. Although H2F actively monitored the Amazon.com website to keep
8 apprised of changes to the Agreement, H2F was not informed of changes to the
9 Agreement that included the addition of an arbitration clause or any contractual
10 provision that barred H2F from being able to resort to public judicial process in
11 holding Amazon accountable for its acts and/or omissions.

13 15. To the extent an arbitration clause came to exist in the Agreement
14 H2F was not aware of the arbitration clause, did not bargain for the arbitration
15 clause, did not receive any consideration for the arbitration clause, and did not
16 accept the arbitration clause by, among other things, clicking "I accept" to any
17 arbitration provision.

20 16. At no time did Amazon send H2F, or any of H2F's officers,
21 employees, or agents any communication informing H2F of Amazon's addition of
22 an arbitration clause.

23 17. There is no express unequivocal agreement to arbitrate between
24 Amazon and H2F.

1 18. The Agreement provided:

2 If we conclude that your actions and/or performance in
3 connection with the Agreement may result in customer
4 disputes, charge backs or other claims, then we may, in
5 our sole discretion, delay initiating any remittances and
6 withhold any payments to be made or that are otherwise
7 due to you under this Agreement for the shorter of: (a) a
8 period of ninety (90) days following the initial date of
9 suspension; or (b) completion of any investigation(s)
10 regarding your actions and/or performance in connection
11 with the Agreement.

12 19. The Agreement further provided:

13 Amazon retains the right to immediately halt any
14 transaction, prevent or restrict access to the Services or
15 take any other action to restrict access to or availability
16 of any inaccurate listing, any inappropriately categorized
17 items, any unlawful items, or any items otherwise
18 prohibited by the applicable Program Policies.

19 20. The Agreement provides, in part, "[i]n the event of any conflicts
20 between the Program Policies and this Agreement, the Program Policies will
21 prevail."

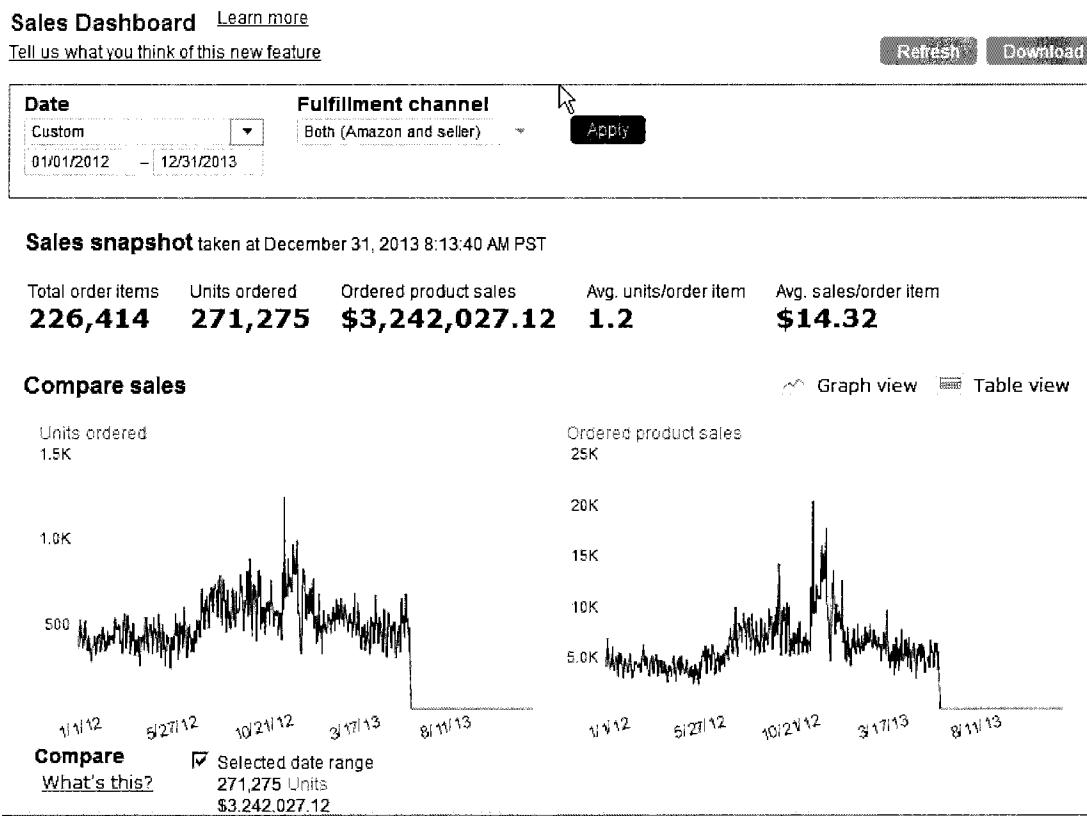
22 21. The Program Policies incorporated in the Agreement include:

23 Amazon encourages sellers to report listings that violate
24 Amazon's policies or applicable law by using our
25 Contact Us form. Select "Report a violation of our rules"
from the drop-down menu and fill out the form. Include
all relevant information so we can conduct a thorough
investigation.

26 22. The Prohibited Seller Activities and Actions policy, provides:

1 Amazon.com Seller Rules are established to maintain a
 2 selling platform that is safe for buyers and fair for sellers.
 3 Failure to comply with the terms of the Seller Rules can
 4 result in cancellation of listings, suspension from use of
 Amazon.com tools and reports, or the removal of selling
 privileges.

5 23. From January 1, 2012 to June 17, 2013, H2F sold over 242,000 items
 6 and generated over \$3,242,027.12 in sales. H2F's "Sales Snapshot" reads:



20 24. In mid-2012 Amazon, as part of beta testing for its Amazon Landing
 21 project, offered to extend up to \$76,000.00 in unsecured funds to H2F. Amazon's
 22 extension of such unsecured funds was reserved for top-notch sales entities of
 23 which H2F was one.

1 25. Amazon utilized certain performance metrics to evaluate H2F's
2 performance. Those performance metrics required H2F to have an "Order Defect
3 Rate" of < 1%, a "Pre-Fulfillment Cancel Rate" of < 2.5%, and a "Late Shipment
4 Rate" of < 4%. From January 2012 through June 2013 H2F exceeded the standard
5 set by Amazon in averaging an "Order Defect Rate", "Pre-Fulfillment Cancel
6 Rate", and "Late Shipment Rate" of .57%, 1.09%, and 2.69% respectively.
7

8 26. On June 14, 2013, H2F received the following communication from
9 Amazon:
10

11 Hello from Amazon.

12 We are writing to inform you that these offers have been
13 removed from our site:

14 ASIN:B004QKM5MG
15 TITLE: Apple iPad 2 Leather Smart Cover - Black
16 (MC947LL/A)

17 ASIN:B004TEPN8M
18 TITLE:Apple iPad Smart Cover - Polyurethane - Blue³

19 We took this action because we were notified by the
20 rights owner that the offers infringe their intellectual
21 property rights and may be counterfeit.

22 Items offered for sale on Amazon.com must be authentic.
23 Any item that has been illegally replicated, reproduced,
24 or manufactured is prohibited. For more information on
25 this policy, search on "Prohibited Content" in seller Help.

³ Throughout this Complaint the above referenced iPad accessories are referred to as "the Items."

1 To resolve this dispute, we suggest that you contact the
2 rights owner directly:

3 Kilpatrick Townsend & Stockton LLP
4 eyakubova@kilpatricktownsend.com

5 If you resolve this matter with the rights owner, please
6 advise them to contact us at notice@amazon.com to
7 withdraw their complaint. We ask that you refrain from
8 posting items manufactured by this rights owner until
you have resolved this matter.

9 Failure to comply with our policies may result in the
10 removal of your selling privileges.

11 We appreciate your cooperation and thank you for selling
12 on Amazon.com.

13 Regards,

14 Seller Performance Team
15 Amazon.com
16 <http://www.amazon.com>

17 27. Apple's report to Amazon of the alleged counterfeit Items sold by
18 H2F is referred to, by Apple, as a "takedown."

19 28. A "takedown" involves Apple investigating the conduct of the
20 business subject to the "takedown," including whether the business is selling
21 counterfeit goods.

1 29. Upon information and belief, Apple based its "takedown" of the
2 Items on (a) certain alleged customer complaints and (b) the low prices by which
3 H2F sold the Items.

4 30. Upon information and belief, the "customer complaints" upon which
5 Apple based its "takedown" stated "NOT A REAL APPLE SMART COVER,"
6 "Not the real Smart Cover," "Not Genuine!," "Not authentic," "fake, don't buy,"
7 "the quality isn't the same, feels cheaper," "the magnetic part where it attaches to
8 Ipad is very week," and "Looks & feel (70%) similar to actual (Apple) ones."
9

10 31. Upon information and belief, neither Apple nor Apple's agents
11 communicated with any of the above-referenced customers.

12 32. Upon information and belief, neither Apple nor Apple's agents know
13 the actual identity (i.e. the real names) of the above-referenced customers.
14

15 33. Upon information and belief, neither Apple nor Apple's agents
16 obtained the alleged counterfeit Items from any of the above-referenced
17 customers.
18

19 34. Upon information and belief, Apple and Apple's agents relied on
20 anonymous Internet postings from the above-referenced "customers" in order to
21 execute its "takedown."
22

1 35. Upon information and belief, neither Apple nor Apple's agents
2 communicated with any natural person or corporate entity who purchased the
3 Items from H2F.

4 36. Upon information and belief, neither Apple nor Apple's agents
5 conducted a "test buy" of the Items.

6 37. The customer reviews that Apple relied on in initiating its
7 "takedown" were general product reviews contained on Amazon.com and not
8 related to H2F's specific sale of the Items.

9 38. At no time did Apple, or Apple's agents, communicate with H2F
10 before initiating its "takedown."

11 39. Had Apple, or Apple's agents, communicated with H2F then Apple
12 would have discovered that the Items sold by H2F were not counterfeit.

13 40. Had Apple, or Apple's agents, communicated with H2F then H2F
14 would have informed Apple that H2F's records revealed that H2F sold
15 approximately 134 of the Items between October 7, 2012, and June 11, 2013,
16 refunded three of the Items, and refunded the three Items because the Items were
17 either "no longer needed" or "buyer's remorse."

18 41. Upon information and belief, Apple initiated the "takedown" because
19 H2F's B004QKM5MG listing offered it for \$14.48 and the H2F's B004TEPN8M
20 listing offered it for \$17.36.

1 42. Upon information and belief, H2F was not the only entity that sold
2 the Items at the above-referenced prices during the timeframe in which Apple
3 planned and executed its "takedown."

4 43. Upon information and belief, other entities sold the Items through
5 Amazon.com, through brick and mortar outlets, and/or online during the
6 timeframe in which Apple planned and executed its "takedown."

7 44. Upon information and belief, neither Apple nor Apple's agents
8 subjected other entities who sold the Items to a "takedown", or like action, during
9 the timeframe in which Apple planned and executed its "take down" of H2F.

10 45. Upon information and belief, Apple's agent for the purpose of
11 planning and executing the H2F "takedown" was Elena Yakubova of the
12 Kilpatrick Townsend & Stockton LLP, (Kilpatrick) law firm.

13 46. Upon information and belief, Kilpatrick is not solely employed by
14 Apple for the purpose of conducting investigations.

15 47. Upon information and belief, Apple is not Kilpatrick's only client.

16 48. Upon information and belief, Ms. Yakubova is not an attorney.

17 49. Upon information and belief, Ms. Yakubova is not an investigator
18 licensed in accord with RCW 18.165 et. seq.

50. Upon information and belief, Ms. Yakubova did not obtain permission from the Washington State Department of Licensing to conduct investigatory work within the State of Washington.

51. Upon information and belief, at no time has Ms. Yakubova maintained a surety bond on file with the Washington State Department of Licensing.

52. Upon information and belief, at no time has Ms. Yakubova maintained certificate of insurance with the Washington State Department of Licensing.

53. Upon information and belief, at no time has Kilpatrick maintained a surety bond on file with the Washington State Department of Licensing.

54. Upon information and belief, at no time has Kilpatrick maintained a certificate of insurance with the Washington State Department of Licensing.

55. As of May 14, 2014, the B004QKM5MG sold on Amazon for \$14.95. *See* <http://www.amazon.com/Apple-iPad-Leather-Smart-Cover/dp/B004QKM5MG> (last visited May 14, 2014).

56. On June 17, 2013, H2F received the following communication from Amazon.

Hello from Amazon.

1 We are writing to let you know that we have removed
2 your selling privileges, canceled your listings, and placed
3 a temporary hold on any funds in your Amazon.com seller
4 account. Any new selling accounts you open will be
5 closed.

6
7 We took these actions because the items you are offering
8 on our site may be counterfeit. Items offered for sale on
9 our site must be authentic.

10 Our policies prohibit offering any item that has been
11 illegally replicated, reproduced, or manufactured. For
12 information on this policy, search on “Prohibited Content”
13 in seller Help.

14 We encourage you to take appropriate steps to resolve any
15 pending orders. Note that any amounts paid as a result of
16 A-to-Z Guarantee claims and charge backs may be
17 deducted from your seller account.

18 After 90 days, the hold will be removed and any
19 remaining funds will be available per your settlement
20 schedule. In addition, balance and settlement information
21 will be available in the Payments section of your seller
22 account.

23 If you have questions about these funds, please write to
24 payments investigate@amazon.com.

25 If you would like to appeal this decision, please visit the
26 Notification page in the Performance section of your
27 account, find this message in the list of notifications, and
28 click the Appeal button
(<https://sellercentral.amazon.com/gp/customerexperience/perf-notifications.html>). For information on creating
29 an appeal, search on “Appeal the Removal of Selling
30 Privileges” in seller Help.

31
32 Regards,

1 Seller Performance Team
2

3 Amazon.com
4

5 57. Per the June 17, 2013, email H2F entered the "Prohibited Content"
6 search phrase "in Seller help"; however, the search did not clearly reveal the
7 policy "prohibit[ing] offering any item that has been illegally replicated,
8 reproduced, or manufactured."

9 58. On June 17, 2013, at 11:52 a.m. PDT, H2F, per Amazon's directive,
10 appealed Amazon's decision.

11 59. On June 18, 2013, at 12:56 p.m. PDT, Amazon responded to H2F's
12 appeal:

14 Hello from Amazon.com.

15 Thank you for writing about the recent blocking of your
16 selling account.

17 As you know, your account was blocked because your
18 items fit a set of criteria that indicates they may be
19 unauthorized by the intellectual property owners.

20 Sellers are expected to know and follow all applicable
21 laws, regulations and Amazon.com's policies when
22 listing their items.

23 Amazon.com reserves the right to close seller accounts
24 that list unauthorized merchandise.

25 Any remaining funds are on temporary hold for 90 days
from the date your account was blocked. After 90 days,

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1 the funds will be disbursed, provided we do not receive
2 charge backs or A-to-Z Guarantee claims against your
3 sales. If you have further questions about your
4 disbursement, please email [payments-
5 funds@amazon.com](mailto:payments-funds@amazon.com).

6 We appreciate your interest in selling on Amazon.com.

7 Regards,

8 Seller Performance Team
9 Amazon.com
10 <http://www.amazon.com>

11 60. In addition to Appealing Amazon's decision, H2F contacted Kilpatrick
12 Townsend & Stockton LLP and Elena Yakubova ("Kilpatrick") the Items' "rights
13 owner" in order to resolve Apple's infringement complaint against H2F.

14 61. Kilpatrick is not, as represented by Amazon in its June 14, 2013,
15 email to H2F, the Items' "rights owner"; it is a law-firm.

16 62. On information and belief, Kilpatrick employs Elena Yakubova, a
17 non-attorney, as an "IP Case Assistant" to file counterfeit allegations against
18 companies, like H2F, who sell Apple products on Amazon at prices that Apple
19 does not like.

20 63. On or about June 25, 2013, Apple admitted to H2F that the
21 infringement claim it lodged with Amazon was in error and represented that Apple
22 had withdrawn its complaint with Amazon.

1 64. On June 25, 2013, H2F informed Amazon that Apple's infringement
2 claim was in error and that Apple had withdrawn the claim.

3 65. On June 27, 2013, H2F received the following communication from
4 Amazon. In its June 27, 2013, email Amazon unilaterally revoked H2F's "selling
5 privileges", an act that permanently shuttered H2F's business.
6

7 Hello from Amazon.com.

8 Thank you for writing about the recent blocking of your
9 selling account.

10 As stated in our email correspondence dated June 17,
11 2013, we removed your selling privileges because your
12 items fit a set of criteria that indicates they may be
13 unauthorized by the intellectual property owners. Sellers
14 are expected to know and follow all applicable laws,
regulations and Amazon.com's policies when listing their
items.

15 Additionally, after a review of your account by an account
16 specialist, we have decided not to reinstate your selling
17 privileges.

18 We regret we are unable to provide further information on
19 this situation. Further correspondence regarding the
closure of your selling account may not be answered.

20 The closure of this account is a permanent action. Any
21 subsequent accounts that are opened will be closed as
22 well.

23 We appreciate your interest in selling on Amazon.com.
24 Regards,

25 Seller Performance Team

1 Amazon.com

2 66. On July 8, 2013, and July 24, 2013, H2F requested that Apple
3 communicate, to Amazon, Apple's decision to withdraw the infringement claim.
4 As part of the complaint withdrawal process Apple asked H2F to provide the name
5 of the Amazon employee to which the withdrawal complaint should be transmitted.
6

7 67. H2F repeatedly emailed Amazon in order to obtain the name of the
8 Amazon employee that Apple requested. Amazon did not supply a name, instead it
9 replied to H2F's requests with boilerplate language indicating that the withdrawal
10 should be sent to "notice@amazon.com."
11

12 68. On August 1, 2013, Apple sent the following email to
13 notice@amazon.com:
14

15 **From:** Yakubova, Elena
16 **Sent:** Thursday, August 01, 2013 12:37 PM
17 **Cc:** Bricker, Ryan
18 **Subject:** Hard 2 Find (Seller ID:
A3KMM4OV4NGQC2)

19 Dear Amazon Copyright Agent:

20 I am contacting you about Hard 2 Find, a seller who
21 posted products against an ASIN number that was
22 associated with counterfeit products. We appreciate
23 Amazon's removal of the listings associated with the
damaging ASIN. Hard 2 Find has agreed not to list any
24 Smart Cover or other Apple products under any ASIN
numbers that are associated with counterfeit products.
25 Based on that agreement and Hard 2 Find's cooperation

1 in addressing our concerns, Apple considers this matter
2 amicably resolved as it relates to Hard 2 Find.
3

4 If you have any questions, please do not hesitate to
5 contact us.
6

7 Best,
8

9 Elena Y.
10

11 69. Although in receipt of the above-referenced email, Amazon refused
12 to reinstate H2F's account.
13

14 70. On August 9, 2013, H2F's attorney contacted Amazon's counsel to
15 ask why Amazon was not honoring the terms of Amazon's June 14, 2013, email.
16

17 71. On August 20, 2013, Amazon contacted H2F and, for the first time,
18 informed H2F that Amazon shuttered H2F's account as a result of factors that
19 were not listed in Amazon's June 14, 2013, communication to H2F. Many of the
20 events Amazon cited as grounds for its decision occurred months before the June
21 17, 2013, account suspension. Amazon ended its August 20th conversation with
22 H2F stating that it had still not received proper notice from Apple regarding the
23 withdrawal of Apple's complaint.
24

25 72. On August 20, 2013, H2F again contacted Apple and again asked
Apple to withdraw its complaint against H2F. To H2F's query Apple stated that
the two reasons it filed the infringement complaint were (1) H2F's association of
26
27

1 the iPad covers with a "troublesome ASIN" and (2) H2F's "aggressive price
2 point."

3 73. The ASIN is the "Amazon Standard Identification Number" - - - a 10
4 character alpha-numeric designation that Amazon - - not H2F - - - applies to each
5 product sold on Amazon. Contrary to Apple's belief, H2F is not responsible for
6 associating an ASIN with a product: that is Amazon's responsibility.

7 74. On September 6, 2013, Apple (again) contacted Amazon and (again)
8 withdrew its complaint against H2F.

9 75. On or about September 19, 2013, Amazon refused to reinstate H2F's
10 account. Instead Amazon advised H2F to develop a plan that addressed the
11 supposed issues with H2F's account and H2F's plan to remedy those issues. In
12 making its demand Amazon cited a previously unknown Apple complaint from
13 January 2013, a previously unknown February 2013 complaint, a March 2013
14 complaint in which H2F was warned against posting against an ASIN associated
15 with Apple, a previously unknown April 2013 warning regarding an unauthorized
16 Trademark usage, and a May 2013 complaint that had subsequently been
17 withdrawn.

18 76. Amazon's list of supposed violations were a pretext. First, H2F does
19 not control the ASIN-product association: Amazon does. Second, the May 2013
20 complaint was withdrawn because it (much like Apple's complaint) was found to
21

1 be untrue. Third, H2F had not been informed of the January, February, and April
2 complaints and those complaints were different from the June 2013 complaint
3 upon which Amazon based its original decision to shutter H2F's business.

4 77. Nonetheless, on September 30, 2013, H2F complied with Amazon's
5 directive and (again) appealed Amazon's decision.

6 78. Amazon did not respond to H2F's appeal but, on October 31, 2013,
7 informed H2F of another Apple infringement complaint - - - a complaint that had
8 no basis in fact because H2F had not conducted business since June 18, 2013 - - -
9 the day Amazon shut it down.

10 79. Amazon never responded to H2F's September 30, 2013, appeal.
11 H2F's account remains suspended.

12 80. All told, H2F lost a total of \$180,112.61 per month as a result of
13 Amazon and Apple's acts and omissions. Damages continue to accrue.

14 81. Additionally, the Agreement between H2F and Amazon provided, in
15 part, that H2F was required to use Amazon's "Payment Service."

16 82. Upon information and belief, Amazon is the sole operator of the
17 "Payment Service" insofar as it does not utilize a middle man to process the
18 payments the buyer makes in purchasing merchandise sold by H2F.

83. Upon information and belief, once H2F ships the product, Amazon acquires the buyer's payment by charging, *inter alia*, the buyer's credit card the purchase amount.

84. Amazon's provision of payment services to H2F is governed by Washington's Uniform Money Services Act. And under the Act Amazon is a "money transmitter."

85. Indeed, Amazon is registered as a "money transmitter" in Washington and, as a "money transmitter" must transmit "the monetary equivalent of all money or equivalent value received from a customer for transmission...to the person designated by the customer within ten business days after receiving the money." RCW 19.230.330.

86. Upon information and belief, Amazon repeatedly failed to transmit, to H2F, buyer payments it received within 10 days as required by Washington law or in accordance with Amazon's Agreement with H2F.

IV. CAUSES OF ACTION

**(CAUSE OF ACTION NO. 1 – BREACH OF CONTRACT -
AMAZON)**

87. Plaintiff re-alleges the above paragraphs 1-86.

88. The Agreement requires Amazon to credit H2F's account within 14 to 19 days of receiving the monies from the purchaser.

89. Amazon held H2F's funds in excess of the time allowed by the Agreement as Amazon held H2F's monies from June 18, 2013 until September 18, 2013 (92 days - regarding H2F's US operation) and June 26, 2013 to October 2, 2013 (98 days - regarding H2F's Canadian operation) .

90. As a result of Amazon's actions H2F was deprived of its funds and damaged as a result.

91. H2F continues to be damaged by Amazon's acts and is entitled to legal and equitable relief against Amazon including damages, specific performance, rescission, an accounting, attorneys' fees, costs of suit, and other relief.

**(CAUSE OF ACTION NO. 2 – BREACH OF CONTRACT -
AMAZON)**

92. Plaintiff re-alleges the above paragraphs.

93. Amazon's Program Policies, which are quoted in paragraphs 16 and 17 above, state that, upon receiving a complaint, the company will conduct a "thorough investigation" and "maintain a selling platform that is safe for buyers and *fair* to sellers." (emphasis added)

94. Amazon's investigation into Apple's allegations was not thorough. Had Amazon inquired as to the underlying bases of Apple's complaint against H2F it would have discovered that the bases for Apple's complaint were faulty.

1 The less-than-thorough nature of Amazon's investigation is further revealed by
2 short time frame (usually 24 hours) in which Amazon received, assessed, and
3 responded to H2F's appeal.

4 95. Amazon agreed to reconsider its suspension of H2F's account. H2F,
5 in relying on Amazon's representation, sent its appeal to Amazon on or about
6 September 30, 2013. As of the date of this lawsuit Amazon has still refused to
7 reconsider H2F's appeal even though H2F followed up with Amazon.

8 96. Amazon's refusal to reconsider H2F's September 30, 2013, appeal,
9 failure to conduct an thorough investigation as required by contract, and failure to
10 ensure that the selling platform was "fair" to sellers has caused H2F damages in an
11 amount to be proven at trial.

12 **(CAUSE OF ACTION NO. 3 – VIOLATION OF FEDERAL AND
13 STATE ANTI-TRUST STATUTES - 15 U.S.C. § 1 ET SEQ. &
14 RCW 19.86 ET SEQ. - AMAZON & APPLE)**

15 97. Plaintiff re-alleges the above paragraphs.

16 98. Apple and Amazon operate in the same market with Apple
17 manufacturing the iPad covers and Amazon, by and through the efforts of H2F,
18 selling the iPad covers.

19 99. The central purpose of the federal and state anti-trust statutory
20 schemes are to preserve competition.

100. In order to establish an anti-trust claim a plaintiff must establish: (1)
1 violation of antitrust law; (2) injury—or impact—resulting from that violation;
2 and (3) measurable damages.

101. Violation of anti-trust law can occur via vertical and/or horizontal
5 price fixing.

102. Generally speaking, vertical price fixing involves a manufacturer
7 (Apple) imposing resale prices on its distributors (like H2F) for unlawful reasons.
8 In order to prevail on a vertical price-fixing claim H2F must prove either a
9 conspiracy or concerted action between two or more actors to fix prices and that
10 the price-fixing conspiracy is illegal pursuant to the applicable legal standard.

103. In this instance, Apple and Amazon have engaged in conspiratorial
13 and/or concerted action that involves (a) Apple monitoring Amazon's sellers (like
14 H2F) for selling items at an "aggressive price point" (b) Apple filing baseless
15 claims with Amazon so as to shutter the offending entity (c) Apple delaying
16 resolution of its complaint with H2F so as to give (d) Amazon time to conjure up
17 after-the-fact reasons for closing H2F's account.

104. Apple and Amazon's knowing and concerted action unlawfully
21 restrained trade by having an anti-competitive effect on H2F: once H2F set its
22 price point too "aggressively" Apple filed an inaccurate report upon which
23 Amazon relied (without undertaking the thorough investigation contemplated in
24 COMPLAINT AND DEMAND FOR JURY
25 TRIAL- 24

1 the Agreement). As such, Apple and Amazon's restraint of trade is unlawful
2 because any legitimate justification for it does not outweigh the anticompetitive
3 effects alleged here: the destruction of H2F's business for pricing iPad covers too
4 low and the raising of the Items' prices, overall to the consumer, as a result of
5 Amazon and Apple's concerted efforts.

6
7 105. The anti-competitive effect of Apple and Amazon's concerted action
8 is further illustrated as follows. As of June 17, 2013, H2F sold the iPad covers at
9 issue for \$14.47 per unit (the black iPad Leather Smart Cover) and \$17.41 per unit
10 (the blue iPad Smart Cover). As of the date of this complaint (and from June 18,
11 2013 onward) the Items are sold for, upon information and belief, prices above
12 what the Items were sold for on June 17, 2013.

13
14 106. Upon information and belief, at no time after June 18, 2013, did
15 Amazon, or any entity utilizing Amazon's selling platform, sell the above-
16 referenced Items for prices lower than what H2F sold those Items for before June
17 17, 2013.

18
19 107. Alternatively, Amazon and Apple are engaged in horizontal price
20 fixing (i.e. collusive price setting or stabilization by competitors) as both entities
21 sell iPad covers themselves.

22
23 108. Amazon and Apple are knowing parties to a contract, combination,
24 and/or conspiracy by which both collude in shuttering business, like H2F, who sell
25

1 products, like the iPad covers in this case, at a rate lower than agreed to by Apple
2 and Amazon. Thus, Apple and Amazon's conduct has the effect of raising the
3 price of the iPad covers in interstate commerce. Apple and Amazon's concerted
4 efforts have caused buyers to pay more for iPad covers and have done so at H2F's
5 detriment.

6
7 109. H2F has been injured directly by Amazon and Apple's conduct. H2F
8 has been damaged by Amazon and Apple's conduct. Apple and Amazon's conduct
9 is unlawful and is of the type that antitrust laws were intended to prevent. Apple
10 and Amazon's conduct had an actual adverse effect on competition as a whole in
11 the relevant market.

12
13 **(CAUSE OF ACTION NO. 4 – VIOLATION OF WASHINGTON
14 UNIFORM MONEY SERVICES ACT (UMSA))**

15 110. Plaintiff re-allegesthe above paragraphs.

16
17 111. Amazon is a money transmitter as defined under the UMSA, RCW
18 19.230.10(19).

19
20 112. Amazon is a licensed money transmitter with the #550-MT-29160
21 registration number.

22
23 113. Under the statute in effect at the time of the allegations in this
24 complaint, a money transmitter "shall transmit the monetary equivalent of all
25 money or equivalent value received from a customer for transmission...to the

1 person designated by the customer within ten business days after receiving the
2 money." RCW 19.230.330 (amended 2014).

3 114. As a money transmitter Amazon collects payments from buyers of
4 H2F's products and then remits those payments to H2F.
5

6 115. Upon information and belief, Amazon routinely fails to transmit
7 payments to H2F within the 10 business day timeframe set out in RCW
8 19.230.330 or within Amazon's own stated policies.
9

10 116. Amazon's failure to follow the UMSA damaged H2F in an amount to
11 be proven at trial.
12

**(CAUSE OF ACTION NO. 5- TORTIOUS INTERFERENCE
WITH BUSINESS/CONTRACTUAL EXPECTANCY - APPLE)**

14 117. Plaintiff re-alleges the above paragraphs.
15

16 118. In order to establish a tortious interference with a business
17 expectancy claim one must establish (1) a business expectancy/contract, (2)
18 knowledge of that expectancy/contract by the defendant, (3) intentional
19 interference by the defendant inducing or causing a breach or termination of the
20 relationship or expectancy/contract, (4) interference by the defendant based on an
21 improper purpose or improper means, and (5) damages.
22
23
24
25

1 119. H2F possessed both a contractual relationship with Amazon and a
2 business expectancy in sales proceeds derived from customer purchases of H2F's
3 products (like the iPad covers) through the Amazon portal.

4 120. Apple knew of H2F's contractual and business expectancy with
5 Amazon as Apple (falsely) informed Amazon that H2F was improperly selling the
6 iPad cases.

7 121. Apple intentionally interfered with H2F's contractual/business
8 expectancy and Apple's intentional interference was the cause of Amazon's
9 termination of H2F's contract/business expectancy.

10 122. Apple's interference was based on an improper motive, purpose, and
11 means. Without limitation, Apple simply didn't like H2F's "aggressive price
12 point" i.e. the H2F was selling the iPad covers at a price less than what Apple
13 desired and filed a false report with Amazon to stop H2F's selling practices.

14 123. Apple's improper interference continued as shown by Apple's delay
15 in informing Amazon of the inaccuracies in its report and Apple's delay in
16 withdrawing its complaint with Amazon.

17 124. Apple's improper means is further shown by its failure to undertake a
18 good faith investigation of customer allegations giving rise to the "takedown."

19 125. Apple's conduct damaged H2F in an amount to be proven at trial.

**(CAUSE OF ACTION NO. 6 –BREACH OF COVENANTS OF
GOOD FAITH AND FAIR DEALING - AMAZON)**

126. Plaintiff re-alleges the above paragraphs.

127. The parties to a contract are required to perform the terms of the contract in good faith and in a manner that deals fairly with the other party.

128. Paragraph 2, of the Agreement provides, in part:

If we conclude that your actions and/or performance in connection with the Agreement may result in customer disputes, chargebacks or other claims, then we may, in our sole discretion, delay initiating any remittances and withhold any payments to be made or that are otherwise due to you under this Agreement for the shorter of: (a) a period of ninety (90) days following the initial date of suspension; or (b) completion of any investigation(s) regarding your actions and/or performance in connection with the Agreement.

129. Amazon did not perform Paragraph 2 in good faith nor did it perform, in good faith, the contractual undertakings set out in paragraphs 18 and 19 of this complaint. By way of example, Amazon did not, as required by Paragraph 2(b) perform an investigation.

130. Investigate means "[t]o inquire into (a matter) systematically" or "[t]o make an official inquiry." Black's Law Dictionary, at 665 (7th Ed. 2000).

131. Amazon conducted no systematic or official inquiry into Apple's allegations: it simply assumed Apple's counterfeit allegation against H2F was true and destroyed H2F's business as a result. Amazon did not inform H2F of the

1 specific allegations that Apple levied against it. And even after Apple informed
2 Amazon that Apple's allegations against H2F lacked factual basis, Amazon still
3 refused to reinstate H2F's account. Further, a systematic investigation would have
4 revealed that the association of the iPad accessories with the improper ASIN was
5 Amazon's fault as Amazon, not H2F, is charged with marrying ASINs with
6 products.

8 132. Amazon violated paragraph 2(a) by not returning H2F's monies
9 within 90 days of the June 18, 2013, suspension.

10 133. Paragraph 18, of the Business Services Agreement provides, in part:

12 Amazon retains the right to immediately halt any
13 transaction, prevent or restrict access to the
14 Services or take any other action to restrict access
15 to or availability of any inaccurate listing, any
16 inappropriately categorized items, any unlawful
applicable Program Policies.

17 134. Amazon did not perform Paragraph 18 in good faith. Paragraph 18
18 requires the finding of an "inaccurate listing", an "inappropriately categorized
19 item", an "unlawful item", or an "item otherwise prohibited by the applicable
20 Program Policies."

22 135. Amazon closed H2F's business even though the items at issue (the
23 iPad covers marked by H2F) were not inaccurately listed by H2F, were not
24

1 inappropriately categorized by H2F, were not unlawful items, and were not
2 prohibited from being sold by Amazon's policies.

3 **(CAUSE OF ACTION NO. 7 – VIOLATION OF CONSUMER
4 PROTECTION ACT - AMAZON)**

5 136. Plaintiff re-alleges the above paragraphs.

6 137. Amazon is a "person" that conducts "trade" and "commerce" within
7 the auspices of Washington's Consumer Protection Act (CPA), RCW
8 19.86.010(1)&(2).

9 138. H2F is a "person" as defined by the CPA.

10 139. By acquiring a "money transmitter" license Amazon had to comply
11 with the UMSA's requirements including, but not limited to, remitting H2F's
12 moneys within 10 days of receiving payment from H2F's customers.

13 140. Amazon's failure to follow the UMSA constitutes a deceptive
14 practice under the UMSA by (a) failing to remit the monies within 10 days of
15 receipt (b) failing to disclose, via the Service Participation Agreement or any other
16 writing, that the terms of the Service Participation Agreement violate the UMSA,
17 and (c) failing to allow H2F to waive the provisions of the UMSA in the Service
18 Participation Agreement.

19 141. Amazon's above-referenced acts took place in the course and scope
20 of Amazon's business, were capable of deceiving a substantial part of the public,
21

1 have a strong likelihood of being repeated, and affect the public interest. Indeed,
2 the Washington Legislature states, in RCW 19.230.005, that its intent is to
3 establish a state system of licenses that ensures the sound and safe exchange of
4 monies.

5 142. H2F suffered injury and lost money by, *inter alia*, being prevented
6 timely access to H2F's funds.

7 143. As such, H2F is entitled to all relief allowed under the CPA.

8 **(CAUSE OF ACTION NO. 8 – BREACH OF FIDUCIARY
9 DUTY - AMAZON)**

10 144. Plaintiff re-alleges the above paragraphs.

11 145. During all relevant times herein Amazon served as H2F's payment
12 agent and, as a result, assumed a fiduciary relationship with H2F.

13 146. Paragraph 19 of Amazon's Service Participation Agreement
14 memorializes the fiduciary relationship.

15 147. By holding H2F's monies in violation of the UMSA Amazon is in
16 violation of both Washington law and its fiduciary duties to H2F.

17 148. H2F has been damages by Amazon's breach of its fiduciary duties.

18 **(CAUSE OF ACTION NO. 9 – UNJUST ENRICHMENT -
19 APPLE & AMAZON)**

20 149. Plaintiff re-alleges the above paragraphs.

1 150. By withholding H2F's monies for periods longer than required by
2 contract or law Amazon was able to earn interest on H2F's monies which, in turn,
3 enriched Amazon unjustly.

4 151. By causing Amazon to close H2F's business Apple eliminated a
5 competitor that was selling products at a price lower than what Apple desired
6 which, in turn, unjustly enriched Apple to the extent that it gained market share as
7 a result of H2F's closure.

8 **(CAUSE OF ACTION NO. 10 – VIOLATION OF CONSUMER
9 PROTECTION ACT - APPLE)**

10 152. Plaintiff re-alleges the above paragraphs.

11 153. Apple's use of an agent unlicensed to conduct investigatory work in
12 the State of Washington is an unfair and deceptive practice which has the capacity
13 to deceive a substantial portion of the public.

14 154. Apple's use of an agent unlicensed to conduct investigatory work in
15 the State of Washington is a violation of the Consumer Protection Act as Apple's
16 use of an unlicensed investigator violated RCW 18.165, the violation of RCW
17 18.165 proximately caused H2F's damages, and H2F is in the class of persons
18 RCW 18.165 intended to protect.

19 155. Apple's use of its unlicensed investigatory agent occurred in the
20 conduct of trade or commerce.

1 156. Apple's use of its unlicensed investigatory agent impacts the public
2 interest as Apple, through its agent, committed such acts in the course of Apple's
3 business as a pattern of practice that repeatedly occurred, will likely continue to
4 occur, and will injure additional plaintiffs in the same fashion as Apple's acts and
5 omissions have harmed H2F.
6

7 157. Apple's use of its unlicensed investigatory agent harmed H2F's
8 business in property and caused Amazon to shut down H2F's business.
9

10 158. H2F has been damaged by Apple's actions in an amount to be proven
11 at trial.
12

(CAUSE OF ACTION NO. 11 – DEFAMATION - APPLE)
13

14 159. Plaintiff re-alleges the above paragraphs.
15

16 160. In order to establish a defamation claim the plaintiff must prove (1) a
17 false and defamatory communication (2) lack of privilege (3) fault, and (3)
18 damages.
19

20 161. Apple communicated to Amazon that H2F was selling counterfeit
21 items.
22

23 162. Apple's communication to Amazon constituted a publication.
24

25 163. The Items were not counterfeit.
26

1 164. Apple's communication to Amazon that the Items were counterfeit
2 was false.

3 165. Apple's communication to Amazon regarding the Items' counterfeit
4 nature was defamatory.

5 166. Apple's communication regarding the Items' counterfeit nature was
6 not privileged.

7 167. Apple's communication regarding the Items' counterfeit nature
8 caused H2F damages in an amount to be proven at trial.

9
10 **V. JURY DEMAND**

11 H2F requests a trial by jury pursuant to Rule 38 of the *Federal Rules of*
12 *Civil Procedure.*

13
14 **VI. PRAYER FOR RELIEF**

15 Plaintiff respectfully prays for:

16 A. Compensation for all injury and damages suffered by H2F including, but
17 not limited to actual, incidental, and consequential damages as well as all damages
18 allowed by law.

19
20 B. Plaintiff's reasonable attorneys, expert fees, and costs.

1 C. For such other and further relief as this Court deems just and equitable.

2 Respectfully submitted this 27th day of June, 2014.

3
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